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Accounting in the Law Schools

WILBER G. KATZ

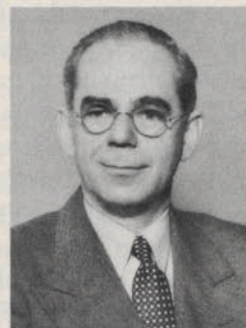
James Parker Hall Professor of Law

In 1930 the first course in accounting at any law school was offered by Professor Willard J. Graham at the University of Chicago. The course was developed after a survey of the opinions of several hundred lawyers as to the importance of accounting in their law practice. When I came to the School, Mr. Graham invited me to join him in writing *Accounting in Law Practice*, which was the first book on accounting written especially for lawyers.

In 1952 the lawyer's need for knowledge of accounting is everywhere admitted. Accounting is a favorite subject for Bar Association institutes and courses for practicing lawyers. In the last two years three accounting books for lawyers have been published—books by Oehler, Shannon, and Shugerman. College study of accounting is generally considered as an important part of prelegal education. Courses in accounting have been introduced in many of the strongest law schools, and two collections of cases and other teaching materials are now available for such courses. In the Harvard Law School curriculum accounting has been made a required subject. At the University of Chicago the course is elected by most of the students.

With an increasing number of legal subjects to be crowded into a three-year program, how can addition of instruction in accounting be defended? If familiarity with accounting is necessary for study of fields like taxation and corporation law, why not merely require college study in the field before admission to law school? One difficulty is with the type of material covered in elementary accounting courses in most colleges and undergraduate schools of business. Much time is devoted to bookkeeping procedures and subjects which are of little concern to the lawyer. Many of the topics most important for the lawyer's work are dealt with only in advanced courses.

Few prelegal students are able to fit into their program of general education enough study of accounting to reach the level needed in the study of law. Furthermore, rigid prelegal course requirements have never been an effective way of assuring uniform preparation of law students. With reference to accounting, therefore, the trend is to include a brief but concentrated introduction in the law school program. Students preparing for a law school with such a program may therefore devote their college years to more basic liberal arts preparation.

*Wilber G. Katz*

Some of the courses and books have been given the title "Legal Accounting." This phrase suggests that there is a particular kind or branch of accounting with which lawyers are concerned. What the lawyer needs, however, is a critical understanding of general accounting theory. A course or text designed for law students or lawyers is suitable also for others who need an introduction to accounting rather than training for accountancy. Thus at the University of Chicago in World War II, law students and graduate students in economics were grouped together for their study of accounting.

The course at The Law School now covers approximately 33 class hours. In this period it is possible to cover the material most essential for law study and to prepare students for further study of accounting problems "on their own" and for effective consultation with professional accountants. The pace of instruction has to be rapid, and ways must be found to exorcise the fear of figures which seems always to turn up in about one-third of the class.

We begin by studying the two basic financial statements, the income statement and the balance sheet, and the relation between these statements. The "double-entry" technique can be taught in a very short time, and with very little "paper work," if the procedures are constantly related to the resulting financial statements.

The accounting concept of income is next studied, and the determination of periodic income as a process of matching items of revenue and expense through the techniques of accrual and deferment. In recent years great strides have been taken by accounting associations in rationalizing and standardizing accounting procedures. Research bulletins of the American Institute of Accountants (an organization principally of practicing accountants) furnish excellent teaching materials on a number of topics. The same is true of some of the formulations of accounting standards developed by the American Accounting Association, the organization of teachers of accounting. The accounting profession has reached the stage of group "restatement" of its principles.

Problems of inventory valuation are considered in some detail, including the controversy over "last-in-first-out" and "first-in-first-out." Considerable time is also devoted to problems of depreciation, including the current controversy over the effect of recent price-level changes and the problem of financing replacements. In this connection attention is given to the recommendations of the "Study Group on Business Income," a group of accountants, lawyers, and economists who wrestled with the problem for several years. Professor Blum has reviewed their report in the January issue of the *Tax Law Review*.

In dealing with such problems, students come to understand that choice among alternatives is made primarily with a view to a meaningful income statement. Decisions thus made also govern the showing of related items on the balance sheet, but determination of balance-sheet "values" is not the primary objective.

It is often necessary to contrast the general accounting concept of income with the concept of taxable net income. This is difficult with students who have not yet studied income taxation and who thus know little of the considerations which account for the divergencies, considerations of administrative convenience, and security in the collection of taxes.

The various classes of reserves are studied in some detail. These items are among the most confusing to the uninitiated reader of financial statements and are items which often feature in litigation. After learning how to distinguish the very diverse types of reserves, students are not surprised to learn that accounting societies are advocating the abandonment of the confusing term "reserve."

One of the important areas of controversy in accounting circles deals with the practice of by-passing the income statement by charging or crediting various unusual items of gain or loss directly to the earned surplus or retained income account. Here is a matter of great importance for lawyers, because of its bearing on the application of provisions in contracts, corporate charters, and other documents which require determination of the "income" or "profits" or "earnings" of a period. This is the type of controversial topic to which college teach-

ers of accounting often give little attention in elementary courses. In one recent intermediate text it is said: "Until the issue is more clearly resolved, an instructor is thoroughly justified in suggesting the adoption of either point of view, if for no other reason than to achieve class uniformity." Imagine a law-school instructor trying to make "class uniformity" his objective in dealing with problems on which the law is not yet settled!

One topic which is often deferred to advanced courses is that of consolidated statements. Corporation lawyers are constantly dealing with such statements and should know what they purport to show and something of the procedures by which they are prepared. By use of simplified materials it is possible in two or three class hours to make students familiar with some of the most troublesome points, such as the elimination of inter-company profits, debts, and stock holdings and the treatment of divergence between the cost of the parent's holdings of stock in the subsidiaries and the book value of these holdings on the books of the subsidiaries.

Increasing use of partnership forms of business organization has given partnership accounting a new importance for the lawyer. Tax considerations often motivate the selection of the partnership form, and these considerations, in turn, are often tied up with accounting treatment of items such as admission and retirement of partners, adjustments for partners' "salaries," and distribution of partnership assets in kind.

Lawyers need also some introduction to the use of accumulation and discount tables for annuities and single sums. Such calculations are involved in amortization loan transactions, in various types of business valuations based upon earnings projections, in inheritance tax valuation of life-estates and remainders, and in many other situations. Understanding of these calculations also facilitates understanding of problems of bond discount and premium and their amortization and the treatment of unamortized balances upon redemption or refunding.

One subject which can be given only passing reference in a brief course is that of cost accounting. It is not that this specialty is unimportant for the lawyer. Cases under the Robinson-Patman Act often turn on cost comparisons as justifying price discrimination, and "renegotiation" of profits under government contracts usually requires complicated study of contract costs. Cost accounting techniques are of great intricacy, however, and little more can be done in an introductory course than to indicate their importance and their relation to the valuation of inventories of a manufacturing business.

Renegotiation cases have also required of lawyers an understanding of the techniques of ratio analysis of financial statements and of the use of comparative statements for a series of years. The significance of principal balance-sheet and income-statement ratios can be presented with a few illustrations, and students can be thus prepared to pursue the subject further in the specialized books on statement analysis.

It is important to develop not only the usefulness of the two basic statements but also their limitations. One of the most important limitations is in relation to study of adequacy of working capital. Material contained in balance sheets and income statements is not arranged so as to facilitate its use for this purpose. In corporate annual reports these statements are often supplemented by a statement of flow of funds. Study of such statements is desirable for a number of reasons including the light thus thrown on the relation between periodic accounting for depreciation (amortization of cost) and the provision of funds for replacements.

Security prospectuses and annual reports to shareholders are used as stimulating and realistic material for presenting many of the topics covered. Students are introduced to SEC Regulation S-X, the general regulation governing statements filed with the Commission, and to the accounting series of releases.

A number of important areas of accounting are left untouched because they are better studied in the law courses themselves. This is true of accounting for issuance and reacquisition of shares, for dividend distribution, and for formal reduction of capital stock and so-called "quasi-reorganization." The same is true of the peculiarities of public utility accounting and of accounting in relation to segregating principal and income when property is held in trust.

As already suggested, the lawyer requires a critical approach to accounting concepts. As an illustration of such an approach, the readings include an imaginative and witty article by Walton Hamilton on the limits of accounting concepts and techniques. To test student understanding of the article, I like to raise the question as to whether Hamilton's attitude is one of hostile debunking. Last year a student immediately answered that such a characterization would be quite unfair—that Hamilton merely applies to accounting concepts the approach familiar to our students from their study of Dean Levi's *Introduction to Legal Reasoning*.

Experience has suggested that a few students have to be warned against expecting too much from their knowledge of accounting. They need to be reminded that legal questions concerning income usually involve questions of interpretation which accounting principles, however well settled, do not foreclose. Thus if it should become recognized that as a matter of accounting depreciation expense should be increased to take account of inflationary change in purchasing power, the resulting concept of income would not necessarily be applicable under an income bond indenture. To apply such a concept of income would give shareholders a protection from the impact of inflation at the expense of bondholders whose maximum return is not adjusted in relation to decreased purchasing power. In learning something of accounting analysis, law students must remember to think like lawyers.

Book Reviews—Home and Abroad

We bring to the attention of the alumni two recent reviews of books published by members of The Law School Faculty. The first, a review of Allison Dunham's *Modern Real Estate Transactions: Cases and Materials*, appeared in the October, 1952, issue of the American Bar Association Journal. The second edition of Edward H. Levi's *An Introduction to Legal Reasoning* was reviewed in the April, 1952, edition of The Law Quarterly Review, published in England. Both reviews follow in their entirety.

Modern Real Estate Transactions: Cases and Materials.

By ALLISON DUNHAM. Brooklyn: Foundation Press, Inc., 1952. Pp. 1029. \$8.50.

Concerning this book, the author, a professor of law at the University of Chicago, says that its objective "is to bring together for teaching purposes the legal concepts and institutions of the marketing of land"; that "it is organized on the basis of problems in house marketing." House-building problems are not dealt with. Starting with the raw material, namely, the land on which the housing structure is finally to stand, the problems of processing the land for its intended use—zoning and other restrictions imposed by public authority—are first considered. Next come controls imposed by private agreement—easements, equitable servitudes and covenants running with the land. Here are considered problems of basic policy as to what restrictions and covenants may be enforced, such as restraints on alienation, racial restrictions.

Problems in house marketing occupy some two-thirds of the book. This is as it should be, since few of the students who use this book will ever represent subdividers or wholesale builders, but all of them will have to do with problems affecting the sale or leasing of housing structures. This practical approach is typical. The student will find nothing here about the the Statute of Uses, or De Donis, or Quia Emptores. He will find something about the Statute of Frauds, for that is an element entering into almost every transaction affecting real property.

In a review of reasonable length, it is possible only to mention some of the house marketing problems dealt with. They cover a field of an extent which will surprise the lawyer who has dealt with such matters piecemeal as they arise in practice. To enumerate a few: Who participates in these transactions—buyer, seller, broker, mortgagee, escrow agent, attorneys for any or all of these—and the laws or customs affecting their participation; documents and papers; when title passes; what constitutes performance; remedies of the parties; title prob-



Allison Dunham

lems and methods of title assurance. The concluding chapter deals with transfers of undivided interests.

Throughout the work is valuable material on the historical, economic and social aspects of house marketing and the preparation of land for residential purposes. As the author is careful to point out in his preface, he espouses no theory. He is a careful and industrious expositor who has presented a well-organized work in which is drawn together from varied sources, not all of them by any means what we commonly term "legal," a vast collection of material dealing with an important field of the law.

The author calls his work a "coursebook." The term suggests casebook, plus something more, giving a promise which the work fulfils. It is in fact a source book, and it has characteristics which we commonly associate with well-written textbooks. For that reason, I have no hesitancy in recommending it to practitioners, as well as to the students for whose needs it was evidently primarily prepared. The opinions, about one hundred, which, scattered throughout, are given in full, do not occupy a disproportionate part of the 1029 pages. The number of additional cases cited or quoted from cannot be readily determined, since not all of them are referred to in the table of cases, but the number is large. A detailed table of contents is supplemented by an index.

WALTER L. NOSSAMAN

An Introduction to Legal Reasoning. By EDWARD H. LEVI. Second Impression. Chicago: University of Chicago Press; London: Cambridge University Press. 1950. Pp. iv + 74. \$2.00.

This book marks an important advance in "realist" jurisprudence. Professor Levi holds with Jerome Frank that it is mere "folklore" to regard law as "a system of known rules applied by a judge" and legal reasoning as consisting in the subsumption of a new case under a given fixed rule. But for him this overthrow of our traditional jurisprudence does not annihilate all jurisprudence; it does not reduce the legal process to mere guesswork or a calculation of the psychological or digestive factors operating within the individual judge. The legal process is still a process of reasoning and legal concepts and rules are still the tools with which it works. Legal reasoning, however, "has a logic of its own." "The kind of reasoning involved in the legal process is one in which the classification changes as the classification is made." Nevertheless this kind of reasoning can be an object of study and, indeed, "the law forum is the most explicit demonstration of the mechanism required for a moving classification system."

Legal reasoning is reasoning by example or analogy. Competing examples, for instance, previous decisions, are presented to the court and the court chooses which it will apply. Its choice is ultimately a reflection of the ideas generally prevailing in the time and place to which it belongs, but its decision is not necessarily expressed

directly in terms of these ideas. The legal process employs a mechanism of rules, concepts and classifications. Each new decision by adding something reshapes the rule, and the classifications thus change from case to case. Yet in their changes a general law of growth and decline can be traced. Professor Levi illustrates his meaning by three brilliant historical studies of case-law, statutory interpretation and constitutional interpretation. In the first stage (we take only his account of case-law, illustrated from the cases concerning dangerous chattels) a succession of courts fumbles its way towards a classificatory concept which will help in the practical task of decision. In the second stage, having found what seems a practically useful concept, for instance, that of "inherently dangerous things," the courts proceed to apply it in a line of cases, filling up its categories with particular instances, until the dangerous list comprises "a loaded gun, possibly a defective gun, mislabelled poison, defective hairwash, scaffolds, a defective coffee urn and a defective aerated bottle," while the nondangerous list includes "a defective carriage, a bursting lamp, a defective balance wheel for a circular saw and a defective boiler." Then in the last stage of the process the courts, feeling (as in the judgments in *MacPherson v. Buick*) that their classification is getting out of touch with social life, or rather that social life is getting out of touch with their classification, begin to cast about for a higher or wider principle or rule, and, as they do so, the concept which hitherto has served them gradually falls into disuse. But a broad formulation of the new principle (such as was attempted by Brett M.R. in *Heaven v. Pender*) is of no use for direct application. The new principle necessarily embodies its own concepts and thus involves the need for further classification. The decision in *Donoghue v. Stevenson*, for instance, contained many possibilities of future distinctions—distinctions as to degree of proximity or degree of control, distinctions between articles for internal consumption and articles for external use, between obvious and latent dangers, between personal injury and mere pecuniary loss, and so on. All these lines of thought may on occasion have to be explored by the courts until new bases for classification are settled. And so the process goes on. One can think of other topics of case-law, for instance, the history of restraints on trade or the cases following upon *Rylands v. Fletcher*, to which Professor Levi's analysis would seem equally apt. It certainly deserves extensive and thorough testing, for, if sound, it opens the way to a new understanding of the common law and its method.

Professor Levi's illustrations of the judicial process applied to statutory interpretation (the Mann Act) and constitutional interpretation (the "commerce clause") are equally brilliant and suggestive. Here too the process is in broad lines the same, but with differences. For instance, a judge is not so free in dealing with a statute or even with interpretative precedent as he is with pre-

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Law and Legal Education

Appropriately, the first of three conferences to honor the Fiftieth Anniversary of the University of Chicago Law School was on the subject "The Profession of Law and Legal Education." Held on December 4, 1952, the conference provided discussions of the numerous changes which have taken place in the organization of the Bar and legal education since the day when the first class entered The Law School.

The morning session, presided over by Law School Alumni Association President Glen A. Lloyd '23, dealt with three types of legal practice under the general heading "A Forward and Backward Glance at the Legal Profession." Charles P. Curtis, of Choate, Hall and Stewart of Boston, spoke on "The General Practitioner and the Specialist." The Assistant General Counsel of the Hercules Powder Company, Charles S. Maddock, reviewed "Present and Future Role of House Counsel," and J. Carlisle Pryor '10, of Clark, Pryor, Hale, Plock and Riley, Burlington, Iowa, discussed "The Small Law Firm."

The University's Chancellor, Dr. Lawrence A. Kimpton, presided at the luncheon session which was on the topic "The Lawyer as a Community Leader." Robert E. Mathews '20, Professor of Law, Ohio State University, and president of the Association of American Law Schools, spoke on "Legal Ethics and Responsible Leadership." Mr. Mathews in his introductory remarks struck an apt nostalgic note by claiming (and we are sure his claim is just) that he was the only man present who attended the cornerstone-laying ceremonies in 1902. As a boy Professor Shailer Mathews' son watched the workmen erect on the University quadrangles The Law School he was graduated from eighteen years later. The greetings of the American Bar Association were brought to the conference by its president, R. B. Storey of Dallas, Texas, who in a reversal of Professor Mathews' topic

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Dean Erwin N. Griswold, Sheldon Tefft, and J. Carlisle Pryor



Left to right: Charles P. Curtis, J. Carlisle Pryor, Glen A. Lloyd '23, and Charles S. Maddock.



Robert McDougal '29 with a group of students at the dinner session of the conference on "The Profession of Law and Legal Education."



Robert E. Mathews '20, Chancellor Kimpton, R. B. Storey, and Laird Bell '08



Left to right: Soia Mentschikoff, Aaron Director, and Talcott Parsons

Crosskey on "Politics and the Constitution"

For many years back, we of the Faculty have known we had inevitably to face the question, whenever meeting with alumni of recent years, "Has Professor Crosskey completed his book?" And we have grown to expect the smile of friendly doubt as to whether he would ever finish, which has always followed our enforced answer: "Not yet." Well, at last, this book, long eagerly awaited

"This remarkable work sweeps away acres of nonsense that have been written about the Constitution, and argues with an amplitude of evidence that the framers of the Constitution and the Bill of Rights believed they were setting up a thoroughly national government, with the states cast in a minor role. Professor Crosskey goes far toward proving that the Federal Convention intended to vest Congress with general (not enumerated) national legislative authority and to confer upon the federal courts a unified national administration of justice. He also shows how and why the original meaning has become obscured and distorted. His book should be in the hands of all students of the Constitution, whether jurists, lawyers, historians or political scientists. It is perhaps the most fertile commentary on that document since *The Federalist* papers of Madison, Hamilton and Jay."

ARTHUR M. SCHLESINGER, SR.

by Mr. Crosskey's students, friends, and colleagues, is about to appear: it will be published by the University of Chicago Press on April 17.

As those of us who have read it know, this book is not just one more among the many poured out in a never ending flood by writers and publishers; it is, instead, one of those rare works whose publication is an intellectual event. Mr. Crosskey undertakes to prove that the Constitution of the United States and much, especially of the earlier part, of American constitutional history are misunderstood; that the "real" Constitution, as it was conceived by the Founding Fathers, has little similarity to that described by the theories of the Supreme Court, under which the country has long been operating.

According to Crosskey, it was the intention of the Fathers—subject to all the limitations upon particular matters that the Constitution contains—to set up a national government of general powers, legislative, executive, and judicial; in particular, it was their intention to make clear that this government would have power, not only to regulate the commerce moving *between territory*

and territory of the several states, but to regulate all economic activity *among the people* of the states; and to establish a single supreme court for the country, with supremacy over all state courts in their administration of all kinds of law, whether written or unwritten, or state or national, in character. Only through a process of distor-



William W. Crosskey

tion, which set in at an early date, was the meaning of the Constitution perverted to what Americans have come to believe it means.

It all sounds incredible. Yet, when Professor Crosskey undertakes to prove that such were, indeed, the historical facts, he means proof in the sense of judicial proof, the kind of proof that will stand up in a court of law, that will be admitted to be presented to the jury, and that is apt to convince them beyond a reasonable doubt. To be sure, events which occurred a hundred-and-sixty-odd years ago cannot easily be proved today with absolute exactitude, in all cases; especially when they consist in the thought-processes of men. But the evidence that exists has been presented, and it is an impressive array, in points overwhelming, not only by its sheer mass, but by the sagacity with which it was discovered and the skill with which it is presented.

Professor Crosskey has gone to the sources, all the sources of which he could possibly think as likely to throw light upon the ideas of the men of 1787 and the product of their deliberations. Of course he has not found everything; but I venture to think it will be a hard task, indeed, to discover any letter, diary entry, newspaper article, pamphlet, or other relevant record of the time which, if still available, Mr. Crosskey has not unearthed, analyzed, and evaluated, in its historical context, as it bears upon his subject. No wonder, then, that it has taken him so many years to complete these volumes.

Those of us who have known Bill Crosskey during the last fifteen years know what an amount of work and effort have gone into this work, how many wakeful nights have been involved, how many hours of poring

over the files of yellowed newspapers of bygone days, how many trips to the libraries of the East, how many revisions of text already drafted, and how many arguments with friends and colleagues. We also witnessed the periods of doubt and disgust, which, however, he always in the end overcame through scholarly persistence.

Now the volumes are before us, and we can follow in its completeness the argument and the evidence.

The fact which is presented as standing out as the principal cause of the transformation of the Constitution is the nonuser for decades by the federal government of those broad powers which were granted to it by the Constitution. The radical change of the country's political climate that occurred almost immediately after the establishment of the new government placed the constitutional powers in the hands of men who not only did not wish to use them but were vitally interested in making their use impossible for the future. The driving force in transforming the Confederation of the thirteen states into a nation came, it will be remembered, from those who formed themselves into the Federalist party after the new government began to function. The principal strength of this group had lain from the beginning in the northern states, especially Massachusetts, where the powerful commercial groups were interested in establishing one national government that could do away with the barriers by which the several states had begun to impede internal trade and which could act for the nation as a whole in its commercial, financial, and political relationships with foreign countries. It was by a fortunate coincidence that, for a short, but decisive period, these northern interests happened to coincide with southern fears that the future development of the western lands of the South might be threatened by foreign powers, especially Spain, and that no effective military defense against such threats would be possible for the South alone. It was this temporary coincidence of interests that produced the Constitution. The ends of neither North nor South, as they were at that time, would have been served by a federal government so impotent as it was later made to appear by the proponents of the theory of states rights.

This theory and the concomitant notion that the federal government, as established by the Constitution, was one merely of a few enumerated powers was invented when a shift in the economic and political situation dampened the temporary southern fervor for a strong national government. The outbreak of revolution in France and the consequent successful slave rebellion in the island of Haiti filled southern slaveowners with alarming fears, not only for the economic bases of their existence, but for the very lives of themselves and their families. Simultaneously, the new prosperity which had begun to succeed the depression of the post-Revolution years, together with those rural resentments against urban financiers to which the Jeffersonians appealed successfully, had come to weaken the influence of the commercial groups of the North and the urgency of their de-

mands. Twelve years after the establishment of the new government it was in the hands of those who were trying to reduce its powers to the minimum level by construction; and it was kept in the hands of such men, almost continuously, during the entire period up to the Civil War. During that long period, whatever governing there was, was done by the states; the powers of the nation under the Constitution were not used.

And after 1812 the same group dominated the Supreme Court. Marshall and Story were lone nationalists on a Court overwhelmingly opposed to their ideas. Marshall fought rear-guard actions, trying to preserve of the original design of the Constitution as much as could be saved for a possibly different future, for tactical reasons going along with his colleagues of the Court's majority and even writing opinions in support of their views. In this view, he thus appears as anything but the bold innovator by whose inventive genius originally narrow federal powers were broadened at the expense of the states.

The total view of constitutional history, as it appears in Mr. Crosskey's work, is even more startling. The picture that arises from the immense body of American historiography is that of a federal nation in which the powers of the central government have been kept from the outset within narrow limits, so narrow, indeed, that they had to be broadened by creative and not always ingenious interpretations, in the period of the Marshall Court, and much more so, in the period since the 1880's, when the scope of governmental functions of the federal government was continuously increased to the dramatic climax of the New Deal and the Washington "centralizers" of the Fair Deal. Every step in this process was contested in the Supreme Court, which thus was thrust into the role of the final arbiter in problems not so much of law as of basic policy, and which sanctioned this steady expansion either by resorting to sophistry or in treating the Constitution as a "living document," the choice of the term depending upon the observer's own leanings. In the view of American history that Mr. Crosskey takes, this traditional view is wrong. Conceived at the outset as a grant of all powers necessary for the vigorous government of a unified nation, the Constitution was by sophistry narrowed down to a mere shadow of its original self; and so successful was this process that the knowledge of the Constitution's original and true meaning was lost completely; and when the need for national governmental action became imperative after the Civil War, the bases for it could barely be found in the Constitution. It thus had to be squeezed and stretched in the most artificial ways to produce that ill-fitting patchwork of powers where intricacies have so often stood in the way of effective governmental action, which has resulted in so many baffling uncertainties, hardships, and injustices, and which would all be unnecessary if the Constitution were only understood in its original meaning. Most of our traditional constitutional law has accordingly been wrong,

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FIFTIETH ANNIVERSARY DINNER



Laird Bell '07, Judge Learned Hand, and Chancellor Kimpton following the Convocation on December 19, at which Judge Hand received an honorary degree. The degree citation read: "An able lawyer, a distinguished judge, and a worthy citizen who, with great learning, skill, and integrity, has worked in the finest tradition to perfect our basic institutions of freedom under law."



Toastmaster Dwight P. Green '12 welcomes Judge Hand to the speakers' table.



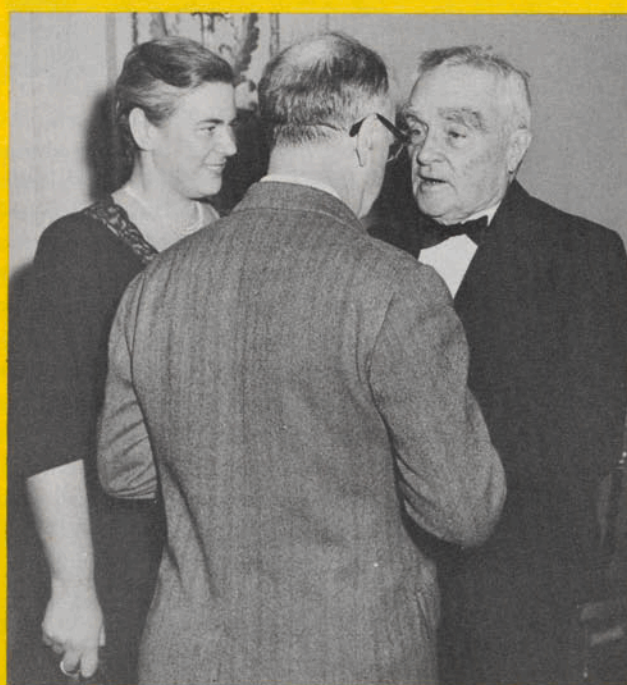
A record crowd of Law School alumni gathered on December 19 for the Fiftieth Anniversary Dinner. Judge Learned Hand, Chancellor Kimpton, and Dean Levi addressed the meeting at which Dwight P. Green, '12, served as toastmaster.



The faculty joined Judge Hand and Chancellor Kimpton at the speaker's table. Present were emeriti Frederic Woodward and George G. Bogert.



James Evans '48 (left), and Fred C. Ash '40, a hard-working committee of two, deserve a vote of thanks for their smooth planning.



Whatever it is that Judge Hand is telling Professor Karl Llewellyn seems to amuse Mrs. Llewellyn, Professorial Lecturer Soia Mentschikoff.



Albert L. Hopkins '08 seen chatting with Judge Hand before the Fiftieth Anniversary Dinner.

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ANNIVERSARY

Federal Tax Conference

We failed, in the Autumn Quarter issue of *THE RECORD*, to report on the fifth annual Federal Tax Conference held in October under the auspices of The Law School, the School of Business, and University College. Alumni readers of *Taxes* magazine will have seen the December



The Fifth Federal Tax Conference in session

issue which reported the proceedings and printed a number of the papers given at the conference. But we want to tell the alumni generally about this fifth and largest (thus far) conference on federal taxation.

The topics ranged from "Shifting Income within the Family Group" to "Practical Legal Aspects of Tax Accounting," and fifteen different subjects filled the three days of meetings. The Planning Committee under the chairmanship of Robert R. Jorgensen of Sears, Roebuck and Company included The Law School's Walter J. Blum, William M. Emery of McDermott, Will and Emery, William N. Hahhad of Bell, Boyd, Marshall and Lloyd, James D. Head of Winston, Strawn, Black and Towner, William A. McSwain of Eckhart, Klein, Mc-



Left to right: Walter J. Blum, Robert N. Miller, and Randolph Paul, with participants at the Fifth Annual Federal Tax Conference.

Swain and Campbell, Michael J. Sporer of Arthur Andersen and Company, Harry B. Sutter of Hopkins, Sutter, Halls, DeWolfe and Owen, and the School of Business' Royal S. Van de Woestyne.

Highlights of the Conference were Randolph Paul's discussion of "Directions in Which Tax Policy and Law Have Been Moving," an appraisal of "The Reorganization of the Bureau of Internal Revenue" by Robert N. Miller, and Leo A. Diamond's analysis of "Gifts to Minors."

Book Reviews (Continued from page 4)

cedents in the realm of case-law, because all the words of a statute are operative and none can be treated as mere dictum; nevertheless they nearly always admit differences of interpretation. A written Constitution such as that of the United States, however, increases the freedom of the courts in as much as it opens the possibility of appealing from precedent or statute to the higher law of the Constitution, and a written Constitution, expressing in broad language the ideals of its age, "must be enormously ambiguous in its general provisions."

Such in the author's view is the true nature of legal reasoning and such are the lines on which it should be studied. Obviously its results in any single case must be uncertain and hard to predict; we may have been rescued from the utter confusion into which other realists seemed to have plunged us but we have no hope of regaining our old comfortable faith in law as an exact science satisfying the ordinary man's desire for certainty in the conduct of his affairs. Why then do we accept the law and bow to its compulsion? Professor Levi does not leave this question unanswered. In the first place, even if we cannot predict the choice which a court will in a particular case make between competing analogies, legal procedure "protects the parties and the community by making sure that the competing analogies are before the court . . . in this sense the parties as well as the court participate in the law making. In this sense, also, lawyers represent more than the litigants." In the second place, much of the law is at any moment reasonably certain. It is only the area of doubt that calls for the intervention of the court and "the area of doubt is constantly set forth. The probable area of expansion or contraction is foreshadowed as the system works. This is the only kind of system which will work when people do not agree completely."

The publishers are not wrong when they say in their note that "this volume will be of interest and value to students of logic, ethics and political philosophy, as well as to members of the legal profession and to everyone concerned with problems of government and jurisprudence." Few volumes of such small bulk contain so much matter for thought.

A. H. CAMPBELL

National Moot-Court Competition

This year The Law School team won second-place honors in the third annual National Inter-Law School Moot-Court Competition. Sponsored by the Committee on Junior Bar Activities of the Association of the Bar of the City of New York, the competition was extended to sixty-two law schools, with fifteen schools participating in the final rounds and the winning place going to Georgetown University Law School.

The Chicago participants were Jean Allard of Trenton, Missouri; George B. Beall, of Dallas, Texas; and



Chicago's 1952 Moot-Court Team (left to right): Paul Wenger, Jr., West Hartford, Connecticut; George Beale, Dallas, Texas; and Jean Allard, Trenton, Missouri, being congratulated by Mr. Justice Reed.

Paul N. Wenger, Jr., of West Hartford, Connecticut. The issue before the Moot Supreme Court was the validity of a state law prohibiting aliens ineligible to become citizens from owning land within the state. Chicago, defending the validity of the law, defeated Western Reserve in the preliminary round, the University of Arizona in the second round, and Vanderbilt in the semifinals.

Judges in the final round were: Mr. Justice Stanley F.

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Jean Allard at the National Inter-Law School Moot-Court Competition

Alumni News

JOHN A. JOHNSON, JD '40, is now general counsel to the Department of the Air Force. Mr. Johnson came to the Law School from De Pauw University, where he received his A.B. An Alpha Delt while at Chicago, he also was a member of the Law School Bar Association and the



John A. Johnson '40

Barristers Club. Upon graduation he joined the legal department of the Burlington Railroad. He subsequently was in the Division of Internal Security Affairs of the Department of State. His wife, the former Harriet Nelson, received her A.B. from the University in 1939.

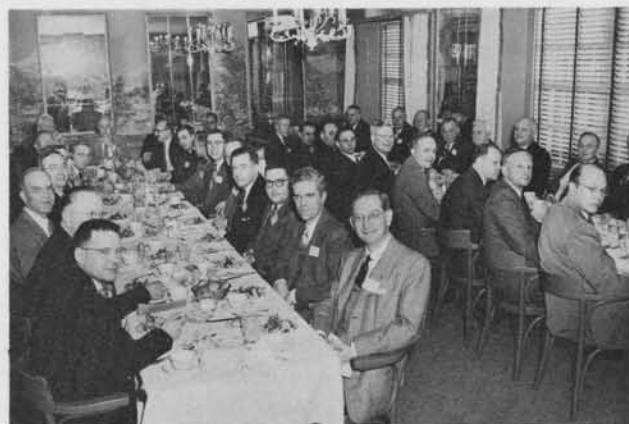
The West Publishing Company has recently issued *Federal Administrative Law* by URBAN A. LAVERY, '10. The former managing editor of the *American Bar Association Journal* has compiled a reference study covering the Administrative Procedure Act of 1946, an evaluation and appraisal of the major agencies in the federal government and a critique of administrative rule making.

PATRICK DONOVAN, who was a Bigelow Fellow in 1949-50, has been appointed Professor of Commercial Law at Melbourne, Australia.

The Ekco Foundation, headed by BENJAMIN A. RAGIR '36 of Ekco Products Company, has es-



Urban A. Lavery '10



The annual meeting of the Association of American Law Schools, which was held this year in Chicago, provided the occasion of a reunion for alumni with their colleagues in The Law School Faculty. Chicagoan Robert E. Mathews '20, Professor of Law at Ohio State University, was president of the Association last year and presided at the sessions.

(Continued on page 13)

New Faces of 1953

Five new appointments of The University of Chicago Law School were announced in January by Dean Edward H. Levi.



Brainerd Currie

Leading the list is Brainerd Currie, Dean of the University of Pittsburgh Law School. A visiting professor at The Law School during the past summer, Mr. Currie is an authority in the field of conflict of laws. He received his Bachelor's degree and Bachelor of Laws degree from Mercer University and a Master of Laws degree from Columbia in 1941. He was admitted to practice in Georgia in 1935 and practiced with the firm of Park and Strozier in Macon. From 1946 to 1949 he was Associate Professor of Law at Duke University and from 1949 to 1952 Professor of Law at the University of California at Los Angeles. A former editor of *Law and Contemporary Problems* and editor-in-chief of the *Journal of Legal Education*, Mr. Currie will join our faculty in the Summer Quarter, 1953.

Philip Kurland, who presently holds the rank of Associate Professor of Law at Northwestern University Law School, also will join the Chicago Faculty this summer. A law clerk to Judge Jerome Frank in 1944-45 and to Justice Felix Frankfurter in 1945-46, Kurland practiced in New York City from 1947 to 1950. An authority in the fields of procedure and federal jurisdiction, Kurland taught at the University of Indiana Law School before joining the Northwestern faculty.



Hans Zeisel

Hans Zeisel, whose appointment as Professor of Law and Sociology became effective on January 1, was formerly director of research for the Tea Bureau, Inc. A co-founder of the Institute of Psychological Market Research at the University of Vienna, Zeisel received his law degree from the University of Vienna and practiced law in Vienna until 1937. Since coming to the United States he has taught economics and statistics at Rutgers University and Columbia University, served as a chief consultant to the United States War Department, and held the positions of chairman on the Committee on Research Techniques of the American Marketing Association and vice-

president of the Market Research Council of New York.



Philip Kurland



Jo Desha Lucas

Two assistant deans have been added to the Law School. Mr. Jo Desha Lucas came to the Law School this year as a Bigelow Teaching Fellow. He was admitted to the Virginia Bar last year after receiving his Master's degree in law at Columbia University Law School. A graduate of Syracuse University, he also holds a Master of Public Administration degree from the Maxwell Graduate School, Syracuse University. Mr. Lucas has been appointed Assistant Professor of Law and Assistant Dean, replacing Mr. Sims Carter as Dean of Students.

Mr. James M. Ratcliffe, who is now Assistant Dean and Director of Placement, holds two degrees from the University of Chicago. He received his A.B. from the College in 1946 and his J.D. from the Law School in 1950, in which year he was admitted to the Illinois Bar. In addition to his responsibilities in the Placement Office, he will work with the Alumni Association in its programs.



James Ratcliffe

Moot Court (Continued from page 11)

Reed; The Honorable John J. Parker, Chief Judge, U.S. Court of Appeals, Fourth Circuit; The Honorable Leslie Knox Munro, Ambassador Extraordinary and Minister Plenipotentiary for New Zealand; The Honorable Stanley H. Fuld, Judge of the Court of Appeals of the State of New York; The Honorable David W. Peck, Presiding Justice, Appellate Division of the Supreme Court, New York; and The Honorable Bethuel M. Webster, President, the Association of the Bar of the City of New York.

The Chicago contestants, as runners-up, were individually presented with copies of *Restatement of the Law*; and for presenting the best brief in the competition the Chicago team got a year's subscription to *Shepards for Illinois*. Jean Allard, for presenting the second-best oral argument, was presented with a copy of *Uniform Laws Annotated*.

The Chicago team was the guest at lunch of White and Case, and Sidney Davis '42 gave the near-winners a consolation luncheon on the day after.

Openings in your firm?—The Placement Office is ready to help you; get in touch with Mr. James Ratcliffe.

Alumni News (Continued from page 11)

tablished a scholarship at The Law School for an initial period of three years. The Ekco Foundation Scholarship will be awarded annually in the amount of \$1,000 to an outstanding student.

Word has been received that VICTOR H. KULP '08, after a long and distinguished teaching career, has retired from the University of Oklahoma.

Through the efforts of ARNOLD I. SHURE '29 an additional full-tuition scholarship has been made available to The Law School from the scholarship funds of Phi Sigma Delta



Arnold I. Shure '29



Left to right: Myres McDougal, Professor of Law at Yale; Edmund O. Belsheim J.S.D. '31, Dean of the Law School, University of Nebraska; and Wilber G. Katz, James Parker Hall Professor of Law at the Association meetings.

fraternity. In the two preceding years the fraternity has provided scholarships for law students.

STEVEN OSUSKY '15, for many years Czech Ambassador to France and now Chairman of the Free Czechoslovakian Government, renewed old acquaintances on a recent visit to Chicago. His arrival fell on the day of Chancellor Kimpton's luncheon for The Law School Fund Advisory Committee, and Morris E. Feiwell '15, Chicago Fund Chairman, welcomed him to the meeting. Osusky brought his fellow-alumni a stirring account of the continuing fight for freedom on both sides of the Iron Curtain.

Jeff Davis and Allen parishes in Louisiana have the youngest district attorney in their history in BERNARD MARCANTEL '48. The new twenty-nine-year-old D.A. of

Jennings, Louisiana, took his LL.B. at Tulane and his J.D. at Chicago.



Left to right: Emeritus Professor George G. Bogert; Professor Ernst W. Puttkammer; (standing) Victor H. Kulp '08, David Ross Boyd Professor Emeritus at the University of Oklahoma Law School; and A. L. Jensen, Professor of Law at the University of Utah, photographed at the reunion luncheon during the meetings of the Association of American Law Schools.

Law and Legal Education (Continued from page 5)

spoke on "Responsible Leadership and Legal Skills."

Soia Mentschikoff, Chicago's first distaff side law professor, presided at the afternoon session on "How Others See the Profession." Talcott Parsons, Professor of Sociology at Harvard University, spoke on "A Sociologist Views the Legal Profession." The bench was represented with "A Trial Judge Views the Profession" with the remarks of The Honorable John P. Barnes, District Judge, United States District Court of the Northern District of Illinois. This multifaceted view of the legal profession was concluded with the paper "A Legal Historian Views the Growth of the Profession in the United States" by Professor James W. Hurst of the University of Wisconsin.

Dean Edward H. Levi presided at the after-dinner and concluding session of the all-day conference. It was a dean's evening. F. Champion Ward, Dean of the College of The University of Chicago discussed "The Liberal Arts and Legal Education," and Brainerd Currie, Dean of the School of Law, University of Pittsburgh (who joins our faculty next fall), spoke on "The Place of Law in the Liberal Arts College." The final speaker of the day was Erwin N. Griswold, Dean of the Law School of Harvard University, who presented a summation and forecast on "The Future of Legal Education."

The proceedings of the first Fiftieth Anniversary conference will be published shortly by The Law School.

Crosskey (Continued from page 7)

and our traditional historiography mistaken, because both have unquestioningly accepted the falsification of the meaning of the Constitution which was brought about by the Jeffersonians for political ends and was gradually foisted onto the country as correct by them and their states-rights successors in the period before the Civil War.

These startling theses are sought to be proved by Professor Crosskey along two lines: a study of the Constitution as a meaningful document, and a study of the facts of American constitutional history. What, he asks, were the real issues, demands, and aspirations at the time of the Revolution? What were the problems developed during the period of Confederation? What did actually occur at the Federal Convention? What were the issues and the tactics of the struggle for ratification? What happened in the political sphere in the early years of government under the Constitution? How did the enemies of unified government produce their new theories about the meaning of the Constitution and by what means did they succeed in substituting them for the original meaning in the public mind so as finally to establish them as the unquestionably accepted meaning?

These broad questions are not fully discussed in the two volumes now before us. The full discussion has been reserved for future parts of the work, of which no more than a tempting foretaste is given now. In these future parts Professor Crosskey will also show the decisive role played in the falsification of the historical picture by James Madison, whose notes on the Federal Convention have generally been accepted as an absolutely accurate report of the proceedings with which they deal. Published more than fifty years after the event and nearly as long after Madison's transformation from an ardent Federalist into a leading states-rights protagonist, these notes should have been treated with suspicion, as, indeed, they were when they first appeared. Professor Crosskey hints at evidence unearthed by him that indicates that such suspicions were not unwarranted.

But, as indicated, all this is for the future. In the two volumes before us now, Mr. Crosskey pursues his other line of proof, which is basically that of the lawyer, rather than the historian, although the latter's tools are consistently employed in the performance of the former's tasks.

The Constitution is a legal document. So, let us read it as lawyers, but—and this is Mr. Crosskey's new proposal—not with the mind of a lawyer of the twentieth century or the late nineteenth century, but with the mind of an American lawyer of the late eighteenth century when the document was drawn. That suggestion, it turns out, cannot be followed easily. The ways of legal thought of the contemporaries of Blackstone and Mansfield were not precisely those of today. Their methods of draftsmanship were different; the political and legal universe within which they lived, strove, worked, and wrote was theirs, not ours. They had problems to solve the very existence of

which has been forgotten; they could take many things for granted which we cannot, and much appeared to them problematical which we take for settled. Besides, and this turns out to be of special significance, their use of language was different from ours. Of course, they thought, discussed, and wrote in English, but it was the English of the 1780's rather than that of later times, and that English had its own usages, in structure as well as in vocabulary. Most of the words of their vocabulary still belong to ours, and mostly they have preserved the same connotations of meaning; but not entirely. There have been shifts, first in nuances, then in a more massive way, but occurring so slowly, so imperceptibly, that they have escaped complete discovery, even by lexicographers, who, with all their meticulous effort, have been unable to record and articulate all the shifts of all the meanings of all the words of the language. Furthermore, basic ideas have shifted in the legal realm; for example, as to the status, makeup, and concrete content of the Common Law; and since Mr. Crosskey shows that the framers regarded the Common Law as being the standing national law, these shifts in legal ideas have an important bearing on what the Constitution means.

The systematic investigation of the eighteenth-century legal world and of the vocabulary of the American Constitution makers of that time is an essential element in the present part of Mr. Crosskey's work, and, when read against the background of the old forgotten legal ideas and with an eighteenth-century vocabulary, the Constitution emerges as a new document, simple, plain, and consistent in all its parts, the carefully considered and well-formulated work of men who cannot have meant anything other than to establish the government of a nation endowed with all the powers necessary for effective government; for, when the document is so read, it cannot be denied that the framers did succeed in expressing their scheme in clear language, plainly understandable to everyone who cares to read it in their way rather than in that of later times.

In his endeavor to read the Constitution in the light of eighteenth-century usage, Mr. Crosskey starts with the Commerce Clause; with the power of Congress to "regulate Commerce among the several States." It is taken as axiomatic today that these words refer to what has come to be known, more generally, as "interstate commerce"; i.e., activities which involve the movement of goods, persons, or intelligence from a point in one state to a point in another. If the clause were literally applied with that meaning, much present-day legislation would be constitutional only within a most narrowly limited field, if at all. To maintain the constitutionality of the federal anti-trust laws, labor laws, social security legislation, agricultural marketing laws, etc., it has therefore been necessary to stretch the supposed constitutional grant of power so as to extend to activities apt to "affect interstate commerce," and then to stretch this new concept to its utmost limits, although the text of the Constitution, when read in the

traditional way, contains nothing which would seem to allow of even the first step in this stretching. But, strangely, there is no evidence that this usual reading was that of the framers or the early expounders of the Constitution. That to them the phrase must have conveyed a different meaning becomes clear when the late-eighteenth-century usage of the three keywords, "Commerce," "regulate," and "States," is investigated. Mr. Crosskey finds that "Commerce" meant not only buying and selling goods and transportation but all gainful activity of every kind. The verb "regulate" was synonymous with "govern." So, "to regulate commerce" simply meant to take all possible governmental measures in the economic sphere. And, as for "among the States," the key to its meaning is that "State," to the eighteenth-century mind, was a "noun of multitude," meaning "the people" who made up the "state"; a noun, in other words, comparable to "tribes" and "nations." And a power "to regulate Commerce among the several States" of America is therefore like a power "to regulate marriage among the several tribes" of some Indian nation. Would anyone understand such a power as limited to the regulation of intertribal marriages? Hardly; the natural meaning would be power to regulate marriage as to all those persons who belong to the Indian tribes. In just the same sense "commerce among the several States" meant, to the man of the eighteenth century, commerce carried on among the people of our American states, all these people, wherever they might be with relation to state lines. "The power to regulate Commerce among the several States" is, then, the power to regulate the internal economic life of the nation, just as the power to regulate commerce with foreign nations is that of governing the nation in its economic relationships with the world outside, and both together, in conjunction with that referring to the commerce with the Indian tribes, constitute the fulness of governmental power to deal with the economic life of the nation, internally and externally. The need for a government having just such power is then shown, by Mr. Crosskey, to have been emphasized by the men who paved the way for the Federal Convention, who composed the document in it, and who hailed it after its adoption, just as it was the butt of those who, early thereafter, began to attack the Constitution as having gone too far for their tastes.

For all these propositions Professor Crosskey adduces ample and convincing evidence. But, still, there remains a source of doubt. If, by the commerce clause, the federal government was given the fulness of power in the economic field, why is it then followed by that catalogue of special economic powers which we find in Section 8 of the First Article of the Constitution: the powers to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures; or the power to establish post offices and post roads, etc? This seeming contradiction is explained when we consider two facts: first, that it was no unusual thing for an eighteenth-century draftsman, in a contract, will, statute, ordi-

nance, or other legal document, first to lay down a broad, general rule, and then to state those of its specific applications for which there existed some particular reason that they be spelled out explicitly. Mr. Crosskey shows a single, common, particular reason did, in fact, exist for the enumeration in Article 1, Section 8, of more than half the specific commercial and other governmental powers there enumerated: they were enumerated to make sure that they belonged to Congress rather than the President. In eighteenth-century England the powers in question had either been recognized as belonging to the Executive, or had been the subject of controversy between king and Parliament. The history of these powers and controversies is traced by Mr. Crosskey with meticulous care, just as he points out the reasons why it was necessary for the Fathers of the Constitution of the United States to state expressly that they were to belong to Congress, *if* Congress was to have them rather than the President. As for the other specifically enumerated powers of Congress, Mr. Crosskey shows the miscellaneous motives that led to the specific mention of all of these, and that these motives had nothing to do with securing power against the states.

Nothing in the text of Section 8, Article I, indicates that it was ever intended to draw the line between the powers of the federal government and those of the states. The clause says that: "The Congress" shall have certain powers, i.e., those which it specifically enumerates, and, then, in its final clause, also the power "to make all laws which shall be necessary and proper for carrying into execution . . . all *other* powers vested by this Constitution in the *government of the United States*, or in any department or officer thereof." This is a plain reference to powers, be it noted, that are vested by the Constitution, not in some special department or officer of the United States, but in the *government* as such. Where in the Constitution are there any such powers? There are powers vested in the President, the Senate, the Congress, or the judiciary, but where are there any powers vested in *the government* as such? So what is the meaning of this reference to the "other Powers" of "the Government," in Section 8 of Article I?

Orthodox constitutional interpretation has no answer to this question. It has consistently ignored this reference to the "other" powers vested in the government of the United States. But, are we allowed to ignore words in an instrument which, as Mr. Crosskey proves, was drafted with great care by experienced draftsmen? Certainly not unless no reference for these words can be found anywhere in the instrument. But such reference can be found; to wit, in the Preamble, which to an eighteenth-century lawyer meant more than a mere statement of policies devoid of direct legal significance. In an eighteenth-century statute, treaty, or ordinance the preamble was an essential part, often the most essential, not in the sense of simply guiding the judge in his interpretation and, even less, in any—at that time—unknown scrutiny of constitutionality, but as the expression of those basic

general principles which, stated bindingly in the most conspicuous place, were to be spelled out as to detail, where necessary, in the following parts of the instrument. When scrutinized in this light, it appears that the Preamble to the Constitution is a most carefully phrased statement of the purposes of government, as they had been analyzed by the writers of the age and which, when brought together, as they were in the Preamble, would refer to the fulness of powers of sovereign government.

Still, the doubter may ask, what about the Tenth Amendment? If the Constitution itself has failed with sufficient clarity to state that the federal government was to be one of enumerated powers, has that thought not found expression in the Amendment? Again we are admonished by Mr. Crosskey to read it, not with the mind of a citizen of the twentieth century, but with the mind of a contemporary of the men of 1789, and again it appears that the text does, not only not militate against, but strongly supports, Mr. Crosskey's reading of the Constitution.

And so, taking up one part of the instrument after the other, the author demonstrates, with infinite care, pains, and patience, that they all make sense and fit together to make up a plain, simple, and efficient governmental scheme, in which the states were not to be obliterated but were to continue to function and to occupy an important role in the governmental structure of the country, but a scheme, nevertheless, under which this country was to be a nation, one and indivisible, and in which the national government was to be able to act in reference to all matters for which uniform regulation and uniform action should at any time be deemed advisable or necessary.

That so shortly after the adoption of the Constitution a political constellation was to arise which would render the exercise of these powers impossible could not be foreseen by its makers. Still less could they foresee that the meaning of their work was to be intentionally distorted by some of those who were in their very midst, and least of all could they foresee that the latter's efforts would be successfully carried on for a period long enough to allow the original meaning of the Constitution to be forgotten and to disappear behind the imperceptibly changed façade of new word meanings and new basic conceptions about the common law. For those doubters who find it hard to believe in the fact of actual, intentional distortion of the Constitution, Mr. Crosskey produces irrefutable evidence; for example, with respect to the two *ex-post-facto* clauses of the Constitution.

For some of his background material we have to wait for the future parts of Mr. Crosskey's work. But what he has presented in the two volumes of *Politics and the Constitution in the History of the United States* is impressive enough.

That the book will be attacked is certain. Its theses are too startling not to provoke resistance on the part of historians as well as on that of the practitioners of constitutional law. For the historians it will not be easy to refute

Mr. Crosskey's charge of uncritical and thus unscholarly acceptance, as historical truth, of a partisan view skilfully propagated under circumstances favorable to its adoption almost beyond belief.

For the constitutional life of the nation, the adoption of Professor Crosskey's reading of the basic text would mean that we shake off as unnecessary ballast those tortured theories which constitutional lawyers found themselves compelled to invent if government was to fulfil elementary twentieth-century needs. There would also disappear those doctrines which have so often and so effectively been used by sectional groups to maintain the sacrosanctity of their tenets and interests. Certainly those interests which are still felt with vigor would find the means for effective defense under any constitutional scheme. Yet, stiff resistance must be expected against the acceptance of Mr. Crosskey's thesis even as historically true. Assuming they were to be accepted as such, it might still be a long way toward their full actualization in constitutional life. A century and a half of error produce the normative effect of the factual. Yet, the meaning which the Founding Fathers meant to express in their work cannot be brushed aside entirely. It will serve as a powerful weapon in political argument, it will be resorted to in dissenting opinions of the Supreme Court, and it is bound to find, though probably, at first, only in scattered instances, expression in decisions of the Court. The readiness of the Court to resort to historical research in its interpretation of the Constitution and early federal legislation has been demonstrated by the use the Court made of Charles Warren's investigation into the meaning of the thirty-fourth section of the first Judiciary Act. Perhaps it might be induced to revise that decision under the impact of Professor Crosskey's convincing demonstration of the incompleteness and, consequently, the misleading nature of Warren's argument. Perhaps, the Court will be induced to revise, or discard, that concept of interstate commerce which, since it became stereotyped and accepted, has resulted in so many unnecessary difficulties, as our author shows. Perhaps, the Court will revise its strange definition of the scope of maritime law which has resulted in so much hardship to injured workers and to employers. Perhaps, the impact of that rediscovered original meaning of the Constitution will bring about changes which cannot yet be foreseen. The book contains dynamite. It will be attacked, the truth of its historical conclusions will be doubted by many, one or the other detail may perhaps be disproved, but neglected it cannot be. Lawyers will use it in argument, judges will have to discuss it, historians will have to test it, politicians will draw upon or inveigh against it, and many will read it for the sheer joy of reliving that decisive period of history which has been so colorfully, readably, and thrillingly re-created in this book.

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